Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1036

OLETA GRAVITT, ETC., ET AL.,

Petitioners,

—against—

SOUTHWESTERN BELL TELEPHONE COMPANY, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 28, 1977

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Opinions Below

The opinions delivered by the courts below are cited in the petition and are set forth in the Appendix thereto (hereinafter cited as "PA").

Jurisdiction

Respondents do not dispute the jurisdiction of this Court as set forth in the petition.

Statutes Involved

In addition to Title 28, United States Code, section 1447(c), (d) (1970), cited and set forth in pertinent part

in the petition, this case also involves the following statutes:

Title 28, United States Code, section 1332(a), (c) (1970):

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different states. . . ."
>
> "(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . ."

Title 28, United States Code, section 1441(a) (1970):

> "(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

Question Presented

May a court of appeals issue a writ of mandamus requiring a district court to retain jurisdiction of an action removed on the basis of diversity of citizenship, when the statutory prerequisites for jurisdiction are undisputably satisfied but the district court nevertheless remanded the action to the state court based on grounds not provided in the statutes governing removal and remand?

Statement of the Case

The petition asks this Court, in effect, to reconsider and overrule its decision last Term in *Thermtron Prod., Inc.* v. *Hermansdorfer,* 423 U.S. 336 (1976). In this case, the court of appeals simply applied *Thermtron,* as it was required to do, by vacating an order of the district court which had remanded a properly removed diversity case upon an unauthorized, non-statutory ground.

1. *Filing of suit and removal of the action.* This action was filed in a Texas state court on November 15, 1974, by James H. Ashley, a discharged executive of Southwestern Bell Telephone Company, and by the widow and two sons of T. O. Gravitt, a former executive of the company. Plaintiffs asserted claims for defamation, invasion of privacy and, in the case of the Gravitt plaintiffs, wrongful death. Named as defendants were Southwestern Bell, a Missouri corporation with its principal place of business in Missouri; Southwestern Bell's corporate parent, American Telephone and Telegraph Company ("AT&T"), a New York corporation with its principal place of business in that state; and Chester L. Todd, Southwestern Bell's Vice President and General Manager for the company's San Antonio area operations, a Texas citizen.

When the action was initially brought, diversity of citizenship was lacking since Todd and certain of the plaintiffs were citizens of Texas. On May 1, 1975, the Gravitt plaintiffs amended their complaint to dismiss Todd as a defendant to their claims. Since the Gravitts were citizens of Texas, Oklahoma, and Florida, their amendment created diversity of citizenship as to their claims against the remaining defendants, Southwestern Bell and AT&T. Accordingly, on May 8, 1975, defendants removed the Gravitts' claims to the United States District Court for the Western

District of Texas, San Antonio Division, pursuant to 28 U.S.C. §§ 1441, 1446(b). Because Ashley's claims, and the claims of the Gravitts with which they were joined, were "separate and independent" within the meaning of 28 U.S.C. § 1441(c), Ashley's action was also removed to federal court pursuant to that section.

Thereafter, plaintiffs moved to remand the action upon a variety of grounds. Plaintiffs' remand motion was heard by Chief Judge Adrian A. Spears on June 5, 1975, and denied. *Gravitt* v. *Southwestern Bell Tel. Co.*, 396 F. Supp. 948 (W.D. Tex. 1975). Judge Spears expressly found that the statutory requirements for removal were present. He noted that "plaintiffs on the one hand, and defendants on the other are citizens of different states, and the ad damnum clause of the amended petition considerably exceeds the $10,000 amount in controversy necessary to confer diversity jurisdiction upon this Court under said statute." *Id.* at 949. He concluded that, "[a]lthough this Court is reluctant to accept jurisdiction . . . it must do so under the plain and unambiguous provisions of the law. . . ." *Id.* at 951.[1]

2. *Remand of action.* On April 2, 1976, almost a year after denial of their first remand motion and following extensive discovery and motion practice in the district court, plaintiffs again moved to remand the action. In their second motion, plaintiffs abandoned any pretext that the action does not fall within the statutory criteria for

1. Judge Spears, although stating he was "unconvinced that plaintiffs' position is supported by competent legal authority", certified the question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1970), referring to the congestion of his docket, the difficulty of providing a speedy trial in federal court, and his realization of a purported "trend" away from diversity jurisdiction. The court of appeals, without opinion, denied plaintiffs' petition for leave to file an interlocutory appeal. (The district court's order of certification, and the court of appeals' subsequent order of denial, are reprinted in Respondents' Appendix.)

removal. Instead, they based their renewed motion upon an estoppel theory predicated upon statements made in a so-called "plea of privilege" — a motion under Texas practice filed by Southwestern Bell to change venue from one county to another — in an unrelated Texas state court action brought in 1968 by a different plaintiff, *Jarvis* v. *Southwestern Bell Tel. Co.*, 432 S.W.2d 189 (Tex. Civ. App. 1968). Plaintiffs construed the plea of privilege as alleging that Southwestern Bell was a Texas corporation. While not disputing that Southwestern Bell is in fact a Missouri corporation with its principal place of business in that state, plaintiffs claimed that under the Texas state law doctrine of judicial estoppel the company was estopped to rely upon its undisputed Missouri citizenship to prove the existence of diversity.

On April 27, 1976, Judge Spears granted the second remand motion on the sole ground that "Southwestern Bell is estopped to allege its Missouri domicile as a basis for diversity jurisdiction in the instant case." *Gravitt* v. *Southwestern Bell Tel. Co.*, 416 F. Supp. 830, 831 (W.D. Tex. 1976); PA at A-19 to A-20. In so ruling, the district judge did not contest Southwestern Bell's Missouri citizenship or change his previous findings that the statutory requirements for removal were satisfied. Rather, his ruling estopped Southwestern Bell to rely upon the undisputed jurisdictional facts because of "the needs of a broad public policy." The district judge also stated that he had been "bombarded . . . with numerous pretrial and discovery matters" and that by remanding the case, justice was done,

> "since the case will now be tried in the forum in which it was originally filed, and where, except for the bungling of plaintiffs [in amending their pleading to dismiss the only resident defendant], it would have remained."

416 F. Supp. at 831-32; PA at A-19, A-21.

3. *Mandamus proceedings.* On July 9, 1976, a unanimous panel of the Court of Appeals for the Fifth Circuit, upon the authority of this Court's decision in *Thermtron Prod., Inc.* v. *Hermansdorfer,* 423 U.S. 336 (1976), granted defendants' petition for a writ of mandamus requiring the district court to vacate the remand order and retain jurisdiction of the action. *See In re Southwestern Bell Tel. Co.,* 535 F.2d 859 (5th Cir. 1976); PA at A-9 to A-16. The panel held that the doctrine of judicial estoppel, like other non-statutory criteria, cannot be employed to defeat a litigant's constitutional and statutory right to a federal forum; the panel therefore directed Judge Spears to make "a suitable inquiry" into the parties' citizenship to determine whether it was "truly diverse". 535 F.2d at 861; PA at A-15.

Judge Spears, and thereafter the plaintiffs, petitioned the court of appeals for rehearing en banc, asserting that the remand decision was immunized from appellate review by 28 U.S.C. § 1447(d) (1970). On August 3, 1976, the court of appeals granted the petitions for rehearing en banc, 535 F.2d at 862; PA at A-15 to A-16. On November 12, 1976, after briefing and oral argument, the court of appeals en banc, by an 8-2 vote, issued a per curiam decision affirming issuance of the writ for the reasons expressed in the panel opinion. *In re Southwestern Bell Tel. Co.,* 542 F.2d 297 (5th Cir. 1976); PA at A-1 to A-8. However, because oral argument had "starkly revealed" that there was no genuine issue of fact as to Southwestern Bell's Missouri citizenship, the en banc decision modified the panel opinion to eliminate the necessity for a further factual determination on that question. The en banc decision also admonished plaintiffs that "[t]his litigation should not be impeded with any further efforts by [them] to avoid federal jurisdiction on insubstantial grounds." 542 F.2d at 298 n.1; PA at A-3 n.1.

Reasons For Opposing The Writ

This case does not satisfy any of this Court's criteria for granting review by writ of certiorari. *See* Sup. Ct. R. 19. The question presented by the petition was settled by this Court only last year in *Thermtron Prod., Inc.* v. *Hermansdorfer,* 423 U.S. 336 (1976). Contrary to petitioners' assertion, the court of appeals' decision is not in conflict with this Court's decision in *Thermtron,* and the petition does not allege that the court of appeals' decision is in conflict with the decision of any other circuit. Moreover, the conflict asserted in the petition between the instant en banc decision and prior panel decisions by the same circuit does not exist, and in any event would provide no basis for review by this Court. Finally, the decision of the court of appeals requiring the district court to adhere to the removal and remand statutes is not a "depart[ure] from the accepted and usual course of judicial proceedings," Sup. Ct. R. 19(1)(b), which would warrant review by this Court.

I.

The Decision Of The Court Of Appeals Is Not In Conflict With Any Decision Of This Court.

This Court decided only last Term the question "whether a Federal District Judge may remand a properly removed diversity case for reasons not authorized by statute, and, if not, whether such remand order may be remedied by writ of mandamus." *Thermtron Prod., Inc.* v. *Hermansdorfer,* 423 U.S. at 337.

In *Thermtron,* a district judge had remanded a removed diversity action on the grounds that his calendar was crowded and that in his opinion other kinds of cases were more deserving of a federal forum. The court of appeals

denied a petition for a writ of mandamus, but this Court reversed, stating that there was no contention that the action was not timely removed or that the jurisdictional prerequisites were not met.

> "So far as the record reveals, it has not been questioned in this case that the cause is between citizens of different States, that it involves a claim of over $10,000 exclusive of interest and costs, that it is within the so-called diversity jurisdiction of the District Court and that it could have been initially filed in the District Court. . . . It also seems common ground that there is no express statutory provision forbidding the removal of this action and that the cause was timely removed in strict compliance with 28 U.S.C. § 1446."

Id. at 344 n.8. Holding that "cases properly removed . . . within the federal court's jurisdiction may not be remanded for discretionary reasons not authorized by the controlling statute," *id.* at 345 n.9, this Court concluded that the district court had exceeded its statutory authority in remanding the action, and that a writ of mandamus should therefore issue. *Id.* at 345.

Thermtron rejected the argument that 28 U.S.C. § 1447(d) (1970) bars appellate review of all remand orders.

> "Congress [n]ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute. . . . Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power and issuance of the writ of mandamus was not barred by § 1447(d)."

423 U.S. at 351.

Thus, under *Thermtron,* the only question properly before the district court in the instant case was whether the statutory criteria for removal contained in 28 U.S.C. §§ 1332(a) and 1441(a) had been applied. Here, as in *Thermtron,* there was no contention that diversity of citizenship was lacking or that the statutory requirements for removal were not satisfied. There is no dispute that Southwestern Bell is a Missouri corporation with its principal place of business in that state, and that plaintiffs seek damages in excess of $10,000. The court of appeals' en banc opinion explicitly recognized that the facts regarding Southwestern Bell's corporate citizenship were "undisputed." 542 F.2d at 298; PA at A-3.

The district judge did not question Southwestern Bell's Missouri citizenship or make any contrary findings of fact. Instead, he invoked the Texas state law doctrine of judicial estoppel to prevent Southwestern Bell from relying upon its undisputed Missouri citizenship for federal jurisdiction purposes. His conclusion was based solely on the plea of privilege filed eight years earlier by a Southwestern Bell attorney in support of a motion to change venue from one Texas county to another in an unrelated state litigation, which he read as a false assertion that the company was a Texas corporation.[2]

The district judge's remand order thus comes precisely within *Thermtron*'s holding because it is based on a ground foreign to the removal statute, which under *Thermtron* provides the only permissible basis for remand. In this case, as in *Thermtron,* the district judge did not look to whether the statutory requisites for jurisdiction were present. In-

2. Whether the district judge's reading of the 1968 plea of privilege was correct is immaterial. The issue before the court of appeals was whether, even assuming that his reading was correct, that plea may estop Southwestern Bell from relying upon the true jurisdictional facts regarding its citizenship for federal jurisdiction purposes.

stead, he set out to adjudicate whether a Southwestern Bell lawyer had made a misrepresentation to a state court in another case eight years earlier; and, having decided in the affirmative, he then denied the company (as well as another defendant not a party to the earlier action) its statutory and constitutional right to a federal forum. By assuming this power without statutory authorization, the district judge ran directly afoul of this Court's prohibition against attempting "to revise the federal statutes governing removal by remanding . . . on grounds that seem justifiable to [him] but which are not recognized by the controlling statute." *Thermtron Prod., Inc.* v. *Hermansdorfer,* 423 U.S. at 351.

Judge Spears also referred in his remand order to other extraneous factors of the type upon which the district judge had relied in *Thermtron.* There the district judge remanded in order to grant plaintiffs "a speedy decision on the merits of their cause" and because of the crowded condition of his docket. *Id.* at 340 & n.3. The order of remand in the instant case recited that this action had been "virtually monopolizing the time and energies of . . . [the] federal court for almost a year," and that "the parties have constantly bombarded this Court with numerous pretrial and discovery matters . . . and there are no indications the case is yet ready for trial." 416 F. Supp. at 831; PA at A-19, A-21. In addition, the remand order stated that justice was served in remanding to plaintiffs' forum of choice, since it was only through what it termed "a fluke"—plaintiffs' amendment of their pleading to delete the only resident defendant—that the action became removable at all. 416 F. Supp. at 831; PA at A-21.

The petition here argues that since 28 U.S.C. § 1447(c) provides that cases may be remanded if they were removed "improvidently and without jurisdiction," whenever a district judge includes those words in his order the court of

appeals is automatically ousted of any authority to review the propriety of remand.[3]

The short answer to this argument is that, despite petitioners' repeated assertion that the district judge "clearly decided that the instant case was removed improvidently and without jurisdiction" (Petition *passim*), the order of remand does not contain any such language. Although the district judge, relying upon the judicial estoppel doctrine, said that the case was "improperly removed," he nowhere found or even stated that the action was "removed improvidently and without jurisdiction," and nowhere did he even refer to 28 U.S.C. § 1447(c).

But even if the district court had recited the statutory language of § 1447(c), *Thermtron* does not hold that the district court's obligation to adhere to the statutory grounds for remand requires only that it incant the "magic words" of the statute, or that by so doing it can avoid review, when it is clear on the face of its decision that it has applied non-statutory considerations. Petitioners' position to the contrary would exalt form over substance and trivialize this Court's *Thermtron* decision into a game of semantics without foundation in policy or reason.

Thermtron went beyond form to substance:

> "[T]his Court has not yet construed the . . . prohibition against review of remand orders so as to extinguish the power of an appellate court to correct a district court that has not merely erred in applying the requisite provision for remand but has remanded a case on grounds not specified in the statute and not touching the propriety of the removal. We decline to construe § 1447(d) so woodenly as to reach that result now."

423 U.S. at 352. *See also id.* at 344.

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3. In effect, petitioners suggest that had the district judge in *Thermtron* merely recited those words at the end of his otherwise unchanged opinion, this Court could not have ordered a writ of mandamus to issue.

Petitioners also attempt to rely on *Angel* v. *Bullington*, 330 U.S. 183 (1947), and related cases[4] in support of their contention that the district court properly relied upon the state law doctrine of judicial estoppel to deny respondents their statutory and constitutional right to a federal forum. Petition at 12. Petitioners' characterization of these cases is erroneous. Those decisions hold only that a district court exercising its diversity jurisdiction may not entertain actions asserting substantive state law rights which cannot be asserted in the courts of the forum state. On the different question of the existence of diversity jurisdiction, it is clearly established that the removal statute "must be construed as setting up its own criteria, irrespective of local law." *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 104 (1941). *See also Mas* v. *Perry*, 489 F.2d 1396, 1399 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974); *Ziady* v. *Curley*, 396 F.2d 873, 874 (4th Cir. 1968).

Under *Thermtron*, the district court's function in determining whether to remand a case is confined solely to determining whether the statutory criteria for diversity of citizenship and the requisite jurisdictional amount are satisfied. As to the existence of diversity of citizenship, Congress has prescribed the exclusive standards for determining the citizenship of a corporation in 28 U.S.C. § 1332(c).

In light of the demonstrably correct application of the *Thermtron* principle by the court of appeals, the petition presents no occasion for review by this Court.

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4. The petition also cites *Woods* v. *Interstate Realty Co.*, 337 U.S. 535 (1949); *Miller* v. *Davis*, 507 F.2d 308 (6th Cir. 1974); and *Szantay* v. *Beech Aircraft Corp.*, 349 F.2d 60 (4th Cir. 1965).

II.

There Are No Conflicting Decisions By Courts Of Appeals.

There is no conflict between the decision which petitioners seek to have reviewed and that of any court of appeals of another circuit, and petitioners do not allege that such a conflict exists. Rather, petitioners assert that the en banc opinion of the court of appeals is "completely contrary to two prior [panel] decisions of the Fifth Circuit." Petition at 3.

The intra-circuit inconsistency asserted by petitioners is demonstrably non-existent.[5] Moreover, an intra-circuit inconsistency, even if it did exist, would provide no basis for review by this Court. Fed. R. App. P. 35(a) confers responsibility for the maintenance of intra-circuit uniformity upon the court of appeals sitting en banc. In addition, this Court has recognized that resolution of intra-circuit incon-

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5. *Robertson* v. *Ball*, 534 F.2d 63 (5th Cir. 1976), cited by petitioners, is fully consistent with the Fifth Circuit's decision in the instant case, because the district court there made an "express invocation" of the statutory standards and remanded on the ground that the action was not " 'one of which this court would have had original jurisdiction . . . .' " *Id.* at 65. There was no such finding by the district court in the instant case and, indeed, the district court here had already found that the case had been properly removed. The standard of review applied by the Fifth Circuit in *Robertson*, as here, was whether the district court had "consider[ed] the proper factors" in deciding remand. 534 F.2d at 66 n.5.

London v. *United States Fire Ins. Co.*, 531 F.2d 257 (5th Cir. 1976), involved an attempt to review a remand by appeal, rather than by mandamus. Further, the district court based its decision upon the defendants' failure to meet the thirty-day requirement for filing a petition for removal, explicitly set forth in the statute. 28 U.S.C. § 1446(b) (1970). The statutory requirements for removal were thus lacking, the action was not "properly removed," and the decision is completely consistent with the decision of the court of appeals in this case. *See Thermtron Prod., Inc.* v. *Hermansdorfer*, 423 U.S. at 343-44 & n.8.

sistencies is primarily the task of the courts of appeals en banc and that it offers no occasion for review by this Court . *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957). *See generally* R. Stern & E. Gressman, Supreme Court Practice § 4.6 (4th ed. 1969).

III.

The Petition Does Not Involve A Departure From The Accepted And Usual Course Of Judicial Proceedings Warranting Review By This Court.

Throughout their papers, petitioners refer to the allegedly dire consequences which will flow from the court of appeals' decision. They assert that the mandamus issued in this case will open a "flood gate of litigation," will "create judicial havoc," and will spell "ruin for future litigants." Petition at 5, 6, 13. Petitioners' assertions are baseless and provide no justification for review under Rule 19(1)(b) of this Court.

Orders by district courts remanding cases without seeking to apply the proper statutory criteria are rare. Moreover, the circumstances involved in this case are unique and not likely to recur. As noted by the court of appeals, the doctrine of judicial estoppel had never before been employed to defeat diversity jurisdiction. 535 F.2d at 861 n.8; PA at A-15 n.8. In light of the decision below, there is little prospect of its future application for that purpose. Only in the infrequent and exceptional instances where remand orders are based upon non-statutory grounds will mandamus be appropriate. The case poses no threat to the orderly administration of justice.

Litigants may always file frivolous requests for relief. But instances of frivolous requests for review may be easily identified from the face of the district court's order and the

petition for mandamus itself; and in such instances, respondents need not even file an answer unless the court of appeals so orders, Fed. R. App. P. 21(b). Moreover, state proceedings are not automatically stayed pending decision on a petition for mandamus, and the court of appeals may summarily dispose of patently meritless requests for relief. The true basis for petitioners' "flood gates" argument is not the decision below. Rather, what petitioners seek here is reconsideration of the *Thermtron* decision.

On a final note, the estoppel rationale of the district court's action in remanding on non-statutory grounds would not only have denied Southwestern Bell its right to a federal forum in this case, but logically would have precluded it in perpetuity from litigating both original and removed actions in federal courts against Texas citizens on the basis of diversity of citizenship. Judge Spears in his submissions to the court of appeals asserted that Southwestern Bell would be estopped to assert its Missouri citizenship solely "[f]or the purpose of this lawsuit", but he provided no rational basis for so limiting his ruling's effect.

The court of appeals' decision did no more than require adherence to the statutory standards for remand, in accordance with *Thermtron.* The decision was correct and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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February 28, 1977

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA75CA117

MRS. OLETA GRAVITT, ET AL.

v.

SOUTHWESTERN BELL TELEPHONE
COMPANY, ET AL.

Order

On this the 20th day of June, 1975, came on to be considered the request of the plaintiffs, Mrs. Oleta Gravitt, individually and as Executrix of the Estate of T. O. Gravitt, Deceased, Michael Gravitt, Patrick Gravitt, and James H. Ashley, that this cause be certified for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), which provides, in part, as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

The order involved, which was entered on June 5, 1975, denied the plaintiffs' motion to remand to the state court the causes of action asserted herein by them. The plaintiffs insist, in their request for certification, that the time and effort expended in this litigation in the state court should equitably prevail over the consequences of the filing of

their first amended petition in that court. While unconvinced that plaintiffs' position is supported by competent legal authority, nevertheless, in view of the improvident filing of the amended petition by the Gravitt plaintiffs; the six months of pretrial and discovery conducted in the state court; the familiarity of the state judge with the entire litigation; the setting of a definite trial date in that Court; the inability of this Court to provide an early trial date; the inordinate length of time that will be required for the trial; the crowded condition of this Court's docket; the necessity, under Rule 50(b), F. R. Cr. P., and the recently enacted Speedy Trial Act, that criminal matters be given high priority in the federal courts; the desirability, in the interest of judicial economy and sound court administration, that the consequences of a *Finn*[1] situation be avoided, if possible; and a realization that the trend may be away from the trial of diversity cases in the federal courts, this Court is of the opinion that the interests of justice would be served by allowing an immediate appeal from the order denying plaintiffs' motion to remand. Certainly, this could materially advance the ultimate termination of the litigation, and, in light of the liberal interpretation placed upon § 1292(b) by the Fifth Circuit Court of Appeals,[2] this Court certifies that a controlling question of law as to which there is substantial ground for difference of opinion is involved.

1. *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 13 (1951), where the case was tried in federal court, but thereafter reversed by the Supreme Court, because it had not been remanded to the state court.

2. See: *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d 697, 703-04 (5th Cir. 1961), where the court held that the underlying purpose of the statute is to circumscribe occasions in which judicial court time is wasted, when the determination of identifiable factual or legal issues would effectively dispose of the matter. *Id.* at 703. To summarize, the Court concluded that § 1292(b) should be treated with "considerable flexibility . . . so that within reasonable limits disadvantages of piecemeal and final judgment might both be avoided." *Id.* at 703.

It is, accordingly, ORDERED that the request of the plaintiffs that this cause be certified for interlocutory appeal from this Court's Order of June 5, 1975, is hereby GRANTED.

Unless ordered to the contrary by the appellate court, the pretrial and discovery procedures set forth in the Order of June 5, 1975, shall proceed according to schedule.

Entered this the 20th day of June, 1975, at San Antonio, Texas.

ADRIAN A. SPEARS
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-8249

MRS. OLETA GRAVITT, ET AL.,
Petitioners,

versus

SOUTHWESTERN BELL TELEPHONE COMPANY, ET AL.,
Respondents.

On Application for Leave to Appeal from an Interlocutory Order

Before COLEMAN, AINSWORTH and SIMPSON, *Circuit Judges.*

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Western District of Texas entered on June 20, 1975, is DENIED.